

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

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74-1960

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United States Court of Appeals

For the Second Circuit

P/S

STAMICARBON, N.V.,

Plaintiff-Appellant,

v.

AMERICAN CYANAMID COMPANY,

Defendant-Appellee.

**On Appeal from the United States District Court
for the Southern District of New York**

APPELLANT'S REPLY BRIEF

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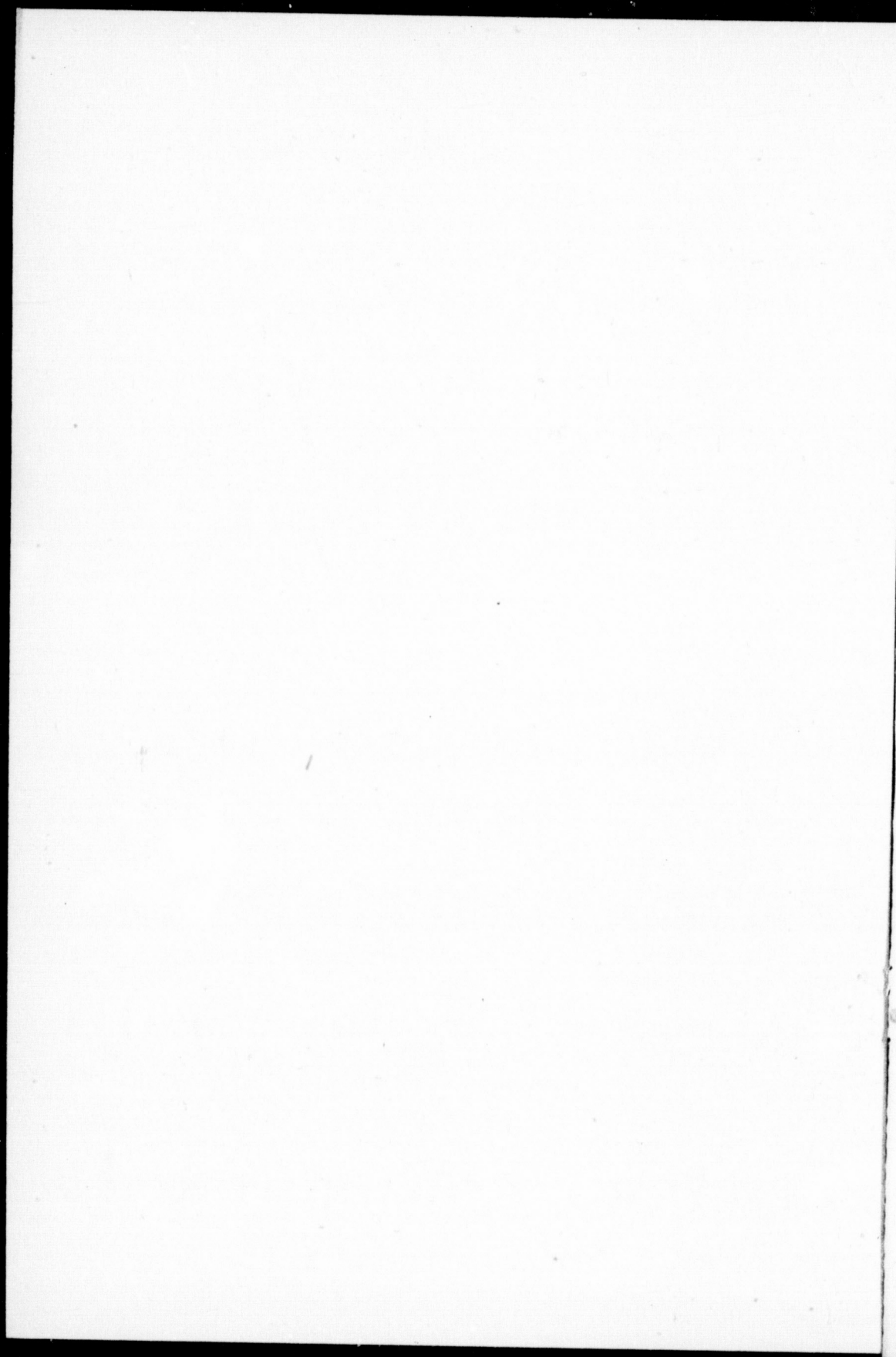


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APPELLANT'S REPLY BRIEF

This reply is submitted to the issues raised by Cyanamid's appellee's brief and to the Government's *amicus curiae* brief opposing this appeal.

POINT I

The Cyanamid - Government argument that the Sixth Amendment right to public criminal trials is limited only to accommodate compelling "public" interests in secrecy is unsupported and unwise. Private non-party trade secrets can be protected by the courts against public disclosure at criminal trials. The Supreme Court's approval of Proposed Federal Rule of Evidence 508 supports this view. The public policy interest in protection of trade secrets is strong. None of the purposes of public criminal trials is served by requiring public disclosure and consequent destruction of private trade secrets at criminal trials.

Both Cyanamid and the Government agree with Stamicarbon that an accused's right to public trial under the 6th Amendment is not absolute but is subject to limitations

to accommodate legitimate interests in preserving secrecy, but both urge the Court to announce that the courts' power to recognize such limitations extends only to matters of "public interest." They argue that trade secrets do not involve a "public interest" and therefore are constitutionally beyond the courts' power to protect from public disclosure in criminal trials (Cyanamid's brief pp. 9-10; Government's brief pp. 14-15).

Inescapably implicit in their position is that, if the line limiting the courts' power is so drawn, the courts are not only powerless to provide trade secret protection in criminal proceedings but the Congress and state legislatures are powerless as well. Only the adoption by three-fourths of the States of a constitutional amendment could arm a court judge with such power—if Cyanamid and the Government are right.

The distinction Cyanamid and the Government attempt to draw between exclusion of the public from portions of criminal trials to protect a "public" interest in secrecy and doing so to protect a "private" interest, such as Stanicar-bon's interest in preserving its trade secrets, is not consistent with the decided cases. Exclusion of the public during the testimony of young victim-witnesses for the prosecution in rape cases is certainly directly aimed at protecting their reputations in their communities; the exclusion of the public during the prosecution testimony of a police undercover agent in *People v. Hinton*, 31 N.Y.2d 71 (1972), cert. den. 410 U.S. 911 (1973), was expressly stated to be intended for the safety of that witness and his continued usefulness as a police undercover agent; the exclusion of the public in *United States v. Bell*, 464 F.2d 667 (2nd Cir., 1972), cert. den. 409 U.S. 991 (1972) was expressly said by this Court to be for the protection of one segment of the public (air travelers).

To adopt the rule suggested by Cyanamid and the Government would be to embrace a nebulous test that will only involve further problems of judicial construction. Each of the cases in which the *in camera* protection has been approved involved the actual interest of a small segment of the general public ranging from air travelers to the lone rape victim or the menaced witness.

Moreover, there is no authority for the contention made by Cyanamid and the Government that an accused's constitutional right to public trial is subject to limitation only to protect a "public" interest. What this Court has said most recently on the subject was that what was required to justify the grant of *in camera* protection was a "justification" of "compelling reasons," *United States v. Clark*, 475 F.2d 240 (2nd Cir., 1973) at 246.

It is respectfully submitted that it would be unwise and injudicious to adopt such a straitjacket limit to the courts' power to weigh the interests of non-parties against the interests of the accused in a public trial. It is submitted that the Court should not limit judicial power to provide protection in the interests of justice and should do so on a case-by-case basis for "compelling reasons."

It is submitted that the interests of justice in this case cry recognition of the existence of such power. The defendant, on the one hand, is faced with a criminal trial in which the Government seeks the "in excess of \$500" (41a). On the other hand, denial of *in camera* protection with respect to evidence relating to Stamicarbon's trade secrets will result in the irreparable destruction of trade secrets of a value of more than \$1,000,000 (5a). There was no doubt that the District Judge would have provided *in camera* protection in the interests of justice if he had believed he had power to do so. Otherwise, the victim of the

Government's prosecution of Cyanamid is more likely to be Stamicarbon.

Moreover, as Stamicarbon's appellant's brief shows, there has been clear recognition by the Supreme Court of the United States (although not in a decided case) that the owner of a trade secret is entitled to protection therefor against destruction by disclosure in federal criminal proceedings. Rule 508 of the Proposed Federal Rules of Evidence approved by the Supreme Court November 20, 1972.

Cyanamid and the Government criticize Stamicarbon for its reliance upon Proposed Rule 508, since it has not yet been enacted by Congress (Cyanamid's brief p. 10, Government's brief p. 16). Cyanamid further points out that H.R. 5493 has dropped the Rule (its brief, fn. 7 at p. 10). The House Bill has dropped all of the nine specific privilege rules of the Proposed Rules (*i.e.*, lawyer-client, doctor-patient, trade secrets, etc.) in favor of a single general rule that the law of privileges continue to be developed by the federal courts "in light of reason and experience," H.R. 5493, 93rd Cong., 2nd Sess., p. 15. The Judiciary Committee Report (House Report No. 93-650, p. 15) in no way suggests that it regarded Proposed Rule 508 as unconstitutional.

Cyanamid's and the Government's criticism of Stamicarbon's reliance upon Proposed Rule 508 is misplaced. That Rule may or may not become statutory law. That is not the point. The point is that whether or not it ever becomes statutory law, the Supreme Court's approval thereof plainly indicates that it would not regard the Rule as violating the United States Constitution. Its approval therefore supports Stamicarbon's contention that the 6th Amendment right to public trial does not extend to re-

quiring that evidence of private trade secrets be presented publicly in federal criminal trials.

The Government makes the further argument that if Rule 508 were enacted, it "would not have authorized restricting the Sixth Amendment, for the privilege will be allowed only 'if the allowance . . . will not . . . work injustice.' " The Government then argues that such a privilege would always work injustice in criminal trials because of its impingement upon the 6th Amendment right (Government's brief, p. 17). This argument is plainly circular and unworthy of consideration. Obviously, if the Supreme Court had not conceived that in some, if not most, cases allowance of the privilege would not work injustice, it would have not approved the Rule.

Furthermore, the Government's said argument is inapposite. The phrase "work injustice" appears in the 1st sentence of Proposed Rule 508, which says,

"A person has a privilege, which may be claimed by him . . . to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

Stamicarbon has *not* sought to prevent either the Government or Cyanamid from presenting evidence of its trade secrets at the criminal trial or to claim a privilege of silence. *It has only sought to obtain protection from the public's presence while disclosure is taking place.* It is not relying upon the 1st sentence of Proposed Rule 508, but upon the 2nd sentence thereof, which states,

"When disclosure is directed, the judge shall take such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require."

In sum, the approval by the Supreme Court of Proposed Rule 508 indicates that our Highest Court would not regard the 6th Amendment right to public trial as requiring public disclosure, with consequent destruction, of evidence of trade secrets in federal criminal trials, and recognizes that where their disclosure is to be required to prevent "injustice," the court is empowered to and is to take "such protective measures as the interests of the holder of the privilege . . . may require." Under this Proposed Rule, the *in camera* type protection for Stamicarbon's trade secrets would clearly be available. The Government has professed no interest in public disclosure of Stamicarbon's trade secrets. Its counsel consented to the receipt of evidence thereto *in camera* (9a). Its brief does not withdraw that consent. Cyanamid also failed to demonstrate any interest in public disclosure of Stamicarbon's trade secrets. Its counsel stated at the hearing that it "had no wish to compromise" them (29a).

The Government makes the argument, which conflicts with the Supreme Court's approval of Proposed Rule 508, that "the protection of trade secrets against disclosure is simply not important enough to justify trenching on the constitutional right to public trial," (Government's brief p. 15), a point it elaborates by saying that "the office of trade secret protection and its importance are distinctly limited" (*Ibid*, p. 18), and that refusal to protect them against public disclosure at criminal trials will "almost surely have no detrimental effect on . . . commercial viability" thereof. (*Ibid*.)

The notion expressed in the Government's brief that trade secret protection is unimportant as a matter of public policy is simply misguided and wrong. The importance thereof is demonstrated by the fact that U. S. international

payments in royalties and fees from technology licenses, which largely reflect trade secret licenses, were \$2.8 billion in 1972.¹ In May of this year, in *Kewanee Oil Co. v. Bicron Corp.*, — U.S. —, 94 S. Ct. 1879, the Supreme Court expressly recognized the public policy interest behind trade secret protection: the dissemination of commercially valuable knowledge (see quote therefrom at p. 32 of Stamicarbon's appellant's brief). At least 20 state statutes,² virtually all enacted in the 1960s³, have made appropriation or unauthorized disclosure of trade secrets a crime. At least 9 federal statutes⁴ have been enacted protecting trade

1. "U.S. International Transactions in Royalties and Fees: Their Relationship to the Transfer of Technology," Teplin, in *Survey of Current Business*, Vol. 53, No. 12 (Dec. 1973).

2. Arkansas Stats. Sec. 41-3939, California Code Anno., Penal Code Sec. 499c, Colorado Rev. Stats. Chapt. 40-5-33, Georgia Criminal Code Sec. 26-1809, Smith-Hurd Illinois Anno. Stats. Chapt. 38, Sec. 15 *et seq.*, Earns Indiana Stats., Title 10, Sec. 2113, Mass. Laws Anno., Chapt. 266, Sec. 30, Michigan Compiled Laws Anno., Title 39, Sec. 752.771 *et seq.*, Minnesota Stats. Anno., Title 40, Sec. 609.52, Nebraska Rev. Stats. Sec. 28-548.01 *et seq.*, New Hampshire Rev. Stats. Anno., Chapt. 580.32, New Jersey Statutes Anno., 2A:119-5.3 *et seq.*, New Mexico Stats. Chapt. 40A-16-23, McKinney's New York Laws Anno., Penal Law, Secs. 155.00, 155.30, and 165.07, Ohio Rev. Code Anno., Title 13, Sec. 1333.51 *et seq.*, Oklahoma Statutes Anno., Title 21, Sec. 1732, Purdon Pennsylvania Statutes, Title 18, Sec. 4899.2, Tennessee Code Anno., Title 21, Sec. 1732, Wisc. Stats. Anno., Criminal Code, Sec. 943.205.

3. This would appear to account for the paucity of criminal cases involving trade secrets to which the Government's brief (p. 18) refers.

4. These statutes are cited at pp. 32-33 of Stamicarbon's appellant's brief. One of these statutes, of which the Government should be aware, is 18 U.S.C. Sec. 1905, which provides, in part here pertinent: "Whoever, being an officer or employee of the United States or any department thereof . . . divulges, discloses or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or report or record made to or filed with such department or . . . officer or employee thereof, which information concerns or relates to the trade secrets, processes . . . or apparatus . . . of any . . . corporation . . . shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

secrets from disclosure to or by government agencies and representatives.

Little imagination is required to visualize the problems of prosecution of a defendant accused of the theft of a trade secret if *in camera* protection of the trade secret cannot be given. The damage to the victim not only would be the fact that the defendant had taken his secret but that the prosecutor, with the aid of the court, would be compelled to publicize and memorialize on the public record the victim's secret.

In short, there is a vast and growing body of state and federal law which recognizes the importance from a public law and policy viewpoint of the protection of trade secrets, which refutes the Government's view that trade secrets are "not important enough" to merit protection from public disclosure at criminal trials.

The Government's brief undertakes to reassure the Court that if it accepts the limitation upon the judicial and legislative power to grant *in camera* protection to trade secrets, not many will be harmed by such limitation upon the courts' power. The Government states:

"The number of criminal prosecutions in which trade secrets arise is small," (its brief, p. 18).

The fact is that there is every reason to believe that while it may be true that the number of prosecutions involving trade secrets is now small, they clearly are destined to grow.

Another indication that protection of trade secret information from public disclosure should be recognized as a legitimate limit upon an accused's right to public trial under the 6th Amendment comes from a consideration of the underlying purposes of the "public trial" requirement of the 6th Amendment. The importance of "public"

criminal trials is pointed out by the authorities cited at fn. 5 at p. 9 of Cyanamid's brief. Essentially, they indicate three underlying purposes to the "public trial" requirement, none of which can have much bearing when the only portion of a criminal trial from which the public is excluded is that at which trade secrets are disclosed.

The first such underlying purpose is that public trials permit persons in the trial audience having knowledge of the facts to step forward and offer their testimony, thus furthering the goal of ascertaining truth at trials and discouraging witnesses from giving false testimony for fear of contradiction from persons in the trial audience. Obviously, in so far as such evidence involves trade secrets, the public, being ignorant of them, can serve no such purpose by its presence.

The second of such underlying reasons is that public trials permit spectators to learn about the operation of the judicial system and thus acquire confidence in it, a reason mentioned in the Government's brief (p. 14). Yet, transparently, the public has no legitimate interest in learning Stamicarbon's trade secrets, and it will scarcely have much confidence in a judicial system which compels the destruction of valuable private rights of a non-party in the course of criminal prosecutions.

The third of such underlying reasons is that the public presence tends to prevent abuse of the accused by the prosecutor and the court. Yet, ample opportunity would be available to the public to perform this function at the major portions of Cyanamid's trial from which the public would not be excluded if Stamicarbon's motion were granted. Moreover, it is plainly unrealistic to expect the public to perform such a function with respect to the presentation of technological evidence.

For all of the foregoing reasons, it is respectfully submitted that Cyanamid's constitutional right to a public trial of the criminal contempt charges against it in 60 Civ. 3857 does not require that the portions of that trial at which evidence of Stamicarbon's trade secrets are disclosed be conducted publicly and that the District Court erred in ruling that it had no power to provide the *in camera* protection of any such evidence (44a) which Stamicarbon sought because of Cyanamid's constitutional right to public trial.

POINT II

Cyanamid's alternate argument that if the courts have power to protect trade secrets from public disclosure at criminal trials, such power was appropriately not exercised here, should be rejected. The argument is based upon a false and misleading description of the District Court's determination, a false characterization of Stamicarbon's position, a deceptive description of Cyanamid's position and upon arguments that the record is non-evidentiary, that the risk of public disclosure of Stamicarbon's trade secrets is hypothetical and remote and that the controversy is not now justiciable. The record is non-evidentiary because the facts were undisputed. The risk of disclosure is real and imminent. The controversy is justiciable and must be adjudicated now, for it will be too late to do so later.

Cyanamid's brief alternatively argues that assuming that protection of trade secrets does constitute an appropriate justification for limiting an accused's right of public criminal trial, that there are a number of reasons why protection should be denied to Stamicarbon in this case. These arguments are all premised upon the basis that the constitutional right to public trial is limitable to provide such protection in the courts' discretion.

(a) In this vein, Cyanamid's brief at times gives the impression that the District Court denied Stamicarbon's motion for a preliminary injunction in the exercise of discretion (e.g., its brief, pp. 1, 13). This is simply untrue. Judge Brieant's decision clearly indicates that he desired to give the *in camera* protection Stamicarbon's motion sought, but that he "believe[d] that the Court lack[ed] power . . . to compel the defendant . . . against its wishes to submit to having" any "part of the trial in camera" (44a). The Government's brief (p. 7), more honestly, does not adopt Cyanamid's tactic.

(b) In the same vein, Cyanamid's brief falsely states that the District Court found that the suggested procedure which it prescribed protects Stamicarbon satisfactorily (its brief, p. 13). The Government's brief does not attempt such a pretense.

The procedure which the District Court did provide at the pre-trial conference in 60 Civ. 3857 on July 11, 1974 (15s) was that Stamicarbon could be present at the criminal trial by counsel, assisted by engineers (17a), and could make objections "when reference is being had to the secret processes," whenever in its opinion questions were asked which would disclose an element of its trade secrets (42a). Initially, the District Court did think that this procedure provided for protection from any disclosure of Stamicarbon's trade secrets because he would rule any such inquiry irrelevant (17a). But, as the hearing progressed, the District Court's views changed. Cyanamid's statement is based upon a reference to Judge Brieant's view at 33a of the record when he still inclined to such views and was urging Stamicarbon's counsel to accept that procedure because it would protect Stamicarbon's satisfactorily, and it, consequently, would not suffer irreparable damage. This is ap-

parent from the full context of the District Court's statement Cyanamid partially quotes. It said:

"if that procedure is not satisfactory to your client my next step here will be to make a suggested finding that that suggested procedure . . . protects you [Stamicarbon] satisfactorily, you therefore have no irreparable damage in this hearing" (33a).

But, the District Court subsequently recognized that the suggested procedure did not protect Stamicarbon satisfactorily at all, because, if a relevant question were asked the answer to which would disclose its trade secrets, "I would have to direct that he answer," (34a), and that District Court therefore made no finding that such procedure protected Stamicarbon satisfactorily, and, to the contrary, concluded that it was unwilling to rule that there "was no circumstance under which" at the trial "an element of the secret process could ever become relevant" (43a) and that "It is possible . . . that there might be a question . . . which might call for a responsive answer which could disclose a secret process" (43a) and that "Stamicarbon would be irreparably injured if the secrets were disclosed" (42a).

(c) In a similar vein, Cyanamid's brief mischaracterizes Stamicarbon's action and motion for preliminary injunction as one by which it sought "blanket *in camera* treatment of any evidence [it] might claim disclosed its trade secrets" (Cyanamid's brief p. 7) "to whatever extent Stamicarbon may in its own discretion" deem requisite (*Ibid.*, p. 2), and as one demanding that it have "the deciding voice in determining what portions of the criminal trial are to be conducted *in camera*" (*Ibid.*, p. 8) and that "it be given *carte blanche* in advance to force *in camera* treatment of *any* evidence it considers to be in the nature of a trade secret" (*Ibid.*, p. 13). This, too, is false. It is not asserted in the Government's brief. The plaintiff's

request was that only those portions of the criminal proceeding which "would involve disclosure of the trade secret know-how it has licensed to Cyanamid be conducted *in camera*" (5a). The order to show cause was limited to a request for protection of that secret know-how (11a, 12a). Stamicarbon never suggested that it be arrogated the power to determine what constituted its valid trade secrets or whether a specific inquiry made at the criminal trial would disclose them. Stamicarbon's position was, and is, that it is the Court's function to determine whether or not specific evidence sought to be elicited or offered would involve disclosure of its trade secrets after having heard the parties on that issue, and that it is completely subject to the District Court's decision upon that issue; but that if the Court determines that disclosure of trade secret information will occur as a result of such evidence, the Court has the authority to grant *in camera* protection to protect the trade secrets from public disclosure and consequent destruction. The District Court clearly indicated its desire to give such protection but believed it was without power to do so.

(d) Cyanamid's brief improperly complains that Stamicarbon's motion is based upon a "sparse record" (its brief p 10) of "[c]onclusory and unsupported allegations of irreparable injury" (*Ibid.* p. 13) for which the "factual support . . . is wholly inadequate" (*Ibid.* p. 12). The Government's brief makes no such assertion.

Cyanamid's complaint is that the record of the proceedings below (apart from the notice of appeal) consist simply of Stamicarbon's verified complaint, its counsel's affidavit in support of its motion for a preliminary injunction, the order to show cause bringing on that motion, and a 33-page

transcript of the argument thereon before the District Court (*Ibid.* p. 11).⁵ Essentially, its contention is that there was no evidentiary proof offered at the hearing upon motion in support of the statements made in the verified complaint and supporting affidavit upon the motion. But the reason no such evidentiary proof was offered was that Cyanamid did not dispute the facts alleged in the complaint or the affidavit, offered no opposing affidavits, and opposed the motion solely "upon the grounds that the complaint fails to state a claim" and upon a memorandum of law (40).

(e) Cyanamid's brief attempts to give the false impression that it is "remote" and "hypothetical" that evidence disclosing Stamicarbon's trade secrets would be disclosed at the criminal trial and argues that, therefore, motion for a preliminary injunction was properly denied (its brief p. 13). This argument is premised upon (i) a claim, not referenced to the record, "that the Government and Cyanamid repeatedly made clear that they would exert every reasonable effort to protect Stamicarbon's trade secrets from *unnecessary* disclosure" (*Ibid.*, p. 6, *emph. added*), and (ii) a claim that the District Court decided that inquiry which would elicit trade secret material is irrelevant (*Ibid.*, p. 7).

The Government made no commitment to Stamicarbon such as Cyanamid claims, and its brief nowhere so asserts.

5. Strictly, Cyanamid's description of the record is incorrect. The verified complaint was presented as an affidavit in support of the motion (8a, 40a), and the record also includes the excerpts of papers and proceedings in 60 Civ. 3857 set forth in the Supplement to the Joint Appendix, since (a) the District Court granted the order to show cause in part "upon all papers and proceedings in 60 Civ. 3857" (11a), (b) Cyanamid has consented to the Supplement to the Joint Appendix, and (c) this Court, by order of Judge Mansfield, as Acting Judge, made August 21, 1974, has ordered that the Supplement to the Joint Appendix be filed upon this appeal.

The most its trial counsel said at the hearing was that he had "purposely structured" his planned direct questions to the Government's witnesses "to avoid that," but still could not "guarantee . . . that a question I ask which I feel is very relevant to my case would not elicit some information that would be secret" (19a). Cyanamid likewise made no such commitment to Stamicarbon. The most its counsel said at the hearing was, "We have *no wish* to compromise their information" (29a). The same Government attorney who made the aforesaid statement had, only four days earlier, stated that it was likely that evidence of Stamicarbon's trade secret would be elicited at the trial (9a) and indicated at the hearing that the Government's case would involve evidence of the capacity of melamine plants (19a) which utilize the Stamicarbon secret process (31a), inquiry about which would involve the Stamicarbon trade secrets (19a). Cyanamid's counsel likewise indicated at the hearing that if the Government presented evidence that production problems at such plants affected their capacity (29a), which the Government's counsel plainly indicated would be so (31a), he intended, upon cross-examination, to inquire into the causes of such problems which would involve trade secret evidence (29-30a).

Cyanamid's attempt to indicate that it is remote that evidence of Stamicarbon trade secrets would be elicited because the District Court ruled such evidence would be irrelevant is likewise specious. It is based upon an earlier view which the District Court did express during the hearing (32a), but which he ultimately rejected, acknowledging in his findings that, "It is possible . . . that there might be a question which would arise . . . which might call for a responsive answer which could disclose" the

trade secrets (43a), and that the Court was unwilling to rule that such evidence would be irrelevant (43a).⁶

The only basis of support for Cyanamid's contention is that the District Court, despite the unanimous view of the Government's, Cyanamid's and Stamicarbon's counsel at the hearing that it was likely that evidence of Stamicarbon's trade secrets would be elicited, still said, at the time he made his decision, that he "thought" this was not so (43a).

The plain fact is that it is a virtual certainty, given the nature of the Government's contentions, that such evidence will be elicited at the trial. As later shown in Point III of this brief (pp. 21-23), the Government's case turns upon the capacity to produce melamine of plants built to use the Stamicarbon trade secret know-how, and it is inevitable that Cyanamid in challenging the Government's witnesses' contentions on this subject will have to elicit testimony about how those plants are designed and operate. In short, it is the inevitable probing into evaluations of the capacity of what is to be measured in the criminal case that evidence descriptive of what that is, which discloses the Stamicarbon trade secrets, will be elicited. This is apparent from the fact that the District Court itself found that the Government's expert witness had relied upon the Stamicarbon

6. A footnote to Cyanamid's brief (p. 12) inaccurately refers to a statement by the District Judge as "responding to several unsuccessful efforts by Stamicarbon's counsel to explain the relevance of its trade secrets and know-how." This is simply untrue. A reading of the reference makes it clear that the Court was not so responding but answering a question from Stamicarbon's counsel. The impression given that Stamicarbon's counsel was engaged in a solo, unsuccessful attempt to prove the relevance of its trade secrets is untrue. The effort was shared by both the Government's counsel and Cyanamid's counsel and was successful, as attested by the Court's ultimate finding, despite its original skepticism, that such information might be relevant.

trade secrets, to determine melamine production capacity in the industry (42a).

(f) Cyanamid, having argued as indicated above and having enticingly said in its brief that it "has not at any time stated that it would not consent to have some particular item of evidence taken *in camera* if, at the time . . . offered . . . the circumstances then confronting [it] demonstrated that such treatment would be warranted and would not be prejudicial to it" (its brief, pp. 7-8), unsoundly urges that the question of whether Stamicarbon trade secrets should be protected from public disclosure at the criminal trial should be considered "a problem" to "be dealt with on its own facts as it may arise in the course of [that] trial," (*Ibid.* p. 13).

This argument is a trap for the unwary. Cyanamid never indicated it would allow the District Court to decide whether *in camera* treatment of particular evidence was warranted or whether Cyanamid would be prejudiced thereby. If the District Court's decision that it has no power to require any part of the trial to be held *in camera* against Cyanamid's "wishes" (44a) is upheld, any such decision would be Cyanamid's alone to make. Moreover, its argument omits mention of the fact that Stamicarbon's counsel did suggest to the Court that the criminal trial begin and that Stamicarbon's motion be held in suspense until trade secret evidence was offered or sought to be elicited (34a). Cyanamid makes no reference to the fact that the Court carefully reviewed the difficulties involved if its ruling were deferred until the trial was in progress since jeopardy would have attached and any interruption to permit appeal might create a claim of double jeopardy (34-35a). Under the circumstances, the Court was clearly correct in its view that it was far better to rule upon Stamicarbon's motion prior to the beginning of the trial, so that the question of

the Court's power could be ruled upon by this Court. Cyanamid is attempting to set up the very double jeopardy trap which the District Court foresaw.

(g) Lastly, Cyanamid argues that this action, at its present stage, is non-justiciable (its brief, p. 12). The Government's brief makes no such claim but, on the contrary, urges that this Court rule upon the merits of Stamicarbon's complaint, albeit against it (its brief, fn. 8 at p. 9). Cyanamid's argument is an attempt to demonstrate the legal legerdemain that there really is no case or controversy before this Court within the meaning of Article III of the Constitution. This feat is tried by claiming that there is not yet any risk of disclosure of Stamicarbon's trade secrets to the public; by ignoring the District Court's finding that such disclosure may occur and will cause plaintiff irreparable damage; by dismissing, as having "no real bearing on the issue," its contractual agreement to use its "reasonably best efforts" to prevent their public disclosure; by ignoring the fact that a claim for injunctive protection from threatened violations of confidential trade secrets is the normal remedy for such controversy because no adequate remedy at law exists; and by ignoring the District Court's express finding that the complaint "does contain fair grounds for controversy and does submit a litigable question" (45a).

The degree of risk may be described differently by the Court and the parties, but the risk is real. It is undisputed that the consequences of disclosure to Stamicarbon are substantial and irreparable. The risk is imminent since the criminal trial is scheduled to begin as soon as this Court rules upon this appeal.

Thus, the controversy is substantial, imminent and real, unlike the situation presented in *O'Shea v. Littleton*, 414

U.S. 488, and similar cases upon which Cyanamid relies. In the *O'Shea* case none of the plaintiffs were under threat of discriminatory prosecution which they feared might occur from a local magistrate. In that case the Supreme Court expressly took note of the fact that if, as and when the plaintiffs were subjected to such discriminatory enforcement of local laws, other remedies would be available.

But, here, if no remedy is given to Stamicarbon, no other adequate remedy will ever be available to it. There will be no opportunity, more immediate than the present moment, for Stamicarbon to seek to prevent public disclosure of its secret at the imminent public trial. It is clear that it has no basis for hope that the District Court will take any action other than to permit such evidence to be elicited publicly because the Court believes it lacks power to do otherwise (44a). If it was wrong, there is no other time than now to correct such error. If not corrected now, such trade secrets will be disclosed and consequently destroyed, and there will be nothing that this Court, or any court, can do later to remedy the situation.

POINT III

Cyanamid's argument that its contractual obligation to use its reasonably best efforts to prevent disclosure of Stamicarbon's trade secrets has no bearing is specious. It is based upon a false statement that the record does not demonstrate that the trade secrets threatened to be disclosed are those which Cyanamid is obligated to protect and upon a wrong argument that its obligation is limited to protecting such trade secrets from disclosure only by its employees. The Government's argument that Cyanamid's obligation to use "reasonably best" efforts to prevent disclosure would not be interpreted by New Jersey courts as an agreement not to exercise a right to require public disclosure of such trade secrets at a criminal trial is wrong and inappropriate because New Jersey protects owners of trade secrets from disclosure thereof at New Jersey criminal trials and the question is one of federal law. The Cyanamid-Government argument that the contractual obligation is not a valid waiver of the right to public trial is inapposite. The contract is a valid enforceable agreement to refrain from exercising such a right as respects Stamicarbon's trade secrets.

Point I of Stamicarbon's appellant's brief argues that Cyanamid, as a licensee of its trade secret know-how, under a license agreement in which it agreed to treat such information as "strictly confidential" and "to use its reasonably best efforts to prevent disclosure thereof" to others and "to safeguard the secrecy" thereof (6a), has a contractual obligation to Stamicarbon to protect its trade secret know-how from public disclosure at the criminal contempt trial which Cyanamid faces by giving its consent that such portions of the trial as involve disclosure of its trade secrets be held *in camera*.

The arguments addressed to these issues made in Cyanamid's and the Government's opposing briefs fall into the

following categories: (A) arguments which are not premised upon a contention that Cyanamid has a constitutional right to public trial of the portions of the trial disclosing the trade secrets; and (B) arguments which are premised upon such a contention. They are addressed in this order below.

A: Non-Constitutionally-Based Arguments

Cyanamid argues that "Article III" (6-7a) of its license agreement with Cyanamid "has no real bearing * * * since it obligates Cyanamid only to preserve the confidentiality of the know-how furnished to it," whereas Stamicarbon's "professed concern is that direct or cross-examination of third party witnesses," i.e. persons other than Cyanamid employees, "called by the Government" is what "may occasion disclosure of its know-how furnished to *other* licensees" (Cyanamid's brief, p. 11). Cyanamid's fore-said argument has two facets: one relating to *what* is threatened to be disclosed; one relating to *who* threatens to disclose it.

To appreciate the lack of merit to Cyanamid's argument, the background facts as to how Stamicarbon's trade secret know-how has become germane to the criminal contempt proceeding and how evidence thereof is likely to be elicited at the criminal trial must be explained.

Stamicarbon's trade secret know-how involves a chemical manufacturing process for making melamine from urea and ammonia and of apparatus suitably utilizable therewith (3a).

The criminal contempt charges against Cyanamid in 60 Civ. 3857 are based upon the fact, admitted by it, that it manufactured 33 million pounds of melamine in the United States in 1972 (29s) and upon the Government's contention

that it was prohibited from then doing so by a provision of the antitrust decree therein which barred it from manufacturing more than 30 million pounds of melamine per year unless competitive "melamine production capacity in the United States" had surpassed a prescribed amount which both Cyanamid and the Government agree is 108 million pounds per year (Cyanamid's brief, p. 4, Government's brief, fn. 4 at p. 5). The competitor producers of melamine whose "melamine production capacity" must add up to less than 108 million pounds per year at that time for the restriction upon Cyanamid to have been operative are Allied Chemical Company, Melamine Chemicals, Inc. ("MCI") and Premier Petrochemical Company ("Premier") (Government's brief, fn. 5 at p. 5). Two of them, MCI and Premier (31a) are, like Cyanamid itself, licensees from Stamicarbon of its trade secret know-how, whose melamine plants were built to utilize such know-how (Cyanamid's brief, pp. 4-5).

It is apparent from statements made by the Government's trial counsel in the criminal case and from Cyanamid's own statements that the Government's contention that "competitive production capacity" was not 108 million pounds or more in 1972, is premised upon a view that the production capacities of the melamine plants of MCI and Premier were actually less than their design capacities (27a, 31a, Cyanamid's brief, p. 4)—that is, the capacities which, according to the design engineering therefor they were built to and should have—due to what the Government contends were "practical" or "realistic limitations" upon the capacities of those plants which existed (31a).

Whether the actual capacities of those plants were less than their design capacities so that those plants did not have the capacity to produce melamine which they should

have had, or whether any failure of MCI or Premier to have produced as much melamine in 1972 as the design capacities of those plants say they should have, was attributable to other factors, such as ineptitude (23s) or improper maintenance or operation of those plants (29s) will be a focal point of the inquiry at the criminal trial. Both the Government's trial counsel and Cyanamid's have so stated (19-20a, 27a, 29-30a).

The Government's views that the actual capacities of MCI's and Premier's melamine plants were less than their design capacities is based upon a study of melamine plant capacity made for the Government by a consultant employed by it for that purpose named Mr. J. Lisle Reed (29s, 32s, 21-22a). His study has, at least in part, been based upon documents furnished to him by MCI and Premier which reveal Stamicarbon trade secret information (22a, 23-25a, 33a, 32s) pursuant to a representation made by him that he would not disclose such information (42a). The Government nonetheless intends to call Mr. Reed as an expert witness in the criminal case (33a) to give expert opinion testimony of his views of the capacities of those plants (Government's brief, p. 5). It also intends to call officers of MCI and Premier to give their views of their plants' capacities (*Ibid.*). In this connection it has subpoenaed for the criminal trial records of Premier and of MCI which reveal Stamicarbon trade secret information (17a, 36s, 41s). Cyanamid also has subpoenaed records for MCI for the criminal trial which reveal Stamicarbon's trade secret information (36s, 38-39s).

Thus, Cyanamid's argument that *what* is threatened to be disclosed in Stamicarbon trade secret know-how furnished to *other* licensees is correct in the sense that it is information about the process and apparatus utilized there-

with which constitute the trade secrets as practiced at MCI's and Premier's plants, not Cyanamid's, which is likely to be disclosed. But, the Stamicarbon know-how thus likely to be disclosed *is the same* know-how as that which Stamicarbon has licensed to Cyanamid and to which its obligations under Article III thereof apply.

Cyanamid's brief states that there "is no factual support for Stamicarbon's assertion that MCI utilizes the same secrets licensed to Cyanamid" (its brief fn. 2 at p. 5 and fn. 3 at p. 6). This statement is entirely false. Stamicarbon's verified complaint herein, which was presented as an affidavit in support of its motion (8a), clearly states that the trade secret know-how licensed to Cyanamid is that licensed to Stamicarbon's other licensees (3-4a); the affidavit in support of its motion likewise so states (8-9a); statements at the hearing indicated that the Stamicarbon process utilized at MCI's and Premier's and Cyanamid's plants is the same (31a). Moreover, in connection with Cyanamid's subpoena for the criminal trial of records of MCI (36s, 38s), Stamicarbon consented to the disclosure of such records to Cyanamid upon the express ground that "both MCI and Cyanamid have purchased from Stamicarbon, and have received and entirely equal level of know-how" (42s). Thus, the record amply supported the District Court's finding that the same "secret processes . . . were licensed to American Cyanamid and several of its competitors" (42s).

As to Cyanamid's argument as to *who* threatens to disclose that trade secret know-how, Cyanamid's brief says that the threat comes from testimony of witnesses for the Government (its brief fn. 8, p. 11), but does not dispute Stamicarbon's showing that the "principal threat of public disclosure and destruction of Stamicarbon's trade secrets

is evidence that Cyanamid intends to elicit" (Appellant's brief pp. 10-12). The reason this is so is that the threat arises initially out of Cyanamid's need to cross-examine the Government's witnesses as to their views of what the capacities of MCI's and Premier's melamine plants which are built to utilize Stamicarbon's know-how. It is testimony of that nature which is descriptive of the structure, process, and apparatus of such plants, upon which any estimation of their capacity must be based, which would disclose Stamicarbon's trade secrets. Cyanamid's counsel plainly indicated at the hearing that if Government witnesses testified that the MCI or Premier plants were afflicted with what were claimed to be difficulties which affected their capacity to produce melamine, he intended upon cross-examination to inquire why and to attempt to elicit evidence that their lack of production was not attributable to a lack capacity but to the operation and maintenance of such plants by MCI or Premier, and this would involve disclosure of the Stamicarbon trade secrets (29-30a).

Thus, there is no legitimacy to Cyanamid's contention that the Stamicarbon trade secret information which Cyanamid's brief acknowledges is threatened to be disclosed (its brief fn. 8 at p. 11) is not the know-how furnished to Cyanamid to which its contractual obligations under Article III of its license agreement relate; and it is principally Cyanamid's interrogation which threatens such disclosure.

Cyanamid's argument that its agreement with Cyanamid "has no real bearing" in the case therefore comes down to a contention that the agreement does not require it to use its "reasonably best efforts to prevent disclosure" of the Stamicarbon trade secret information which it shares with Stamicarbon's other licensees to the public through the mouths of non-Cyanamid personnel. The contractual

obligation is, on its face, not so limited, and the contract provision (6-7a) plainly indicates that it was not intended to be so limited.

This is apparent from several aspects thereof. (1) The promise to use "reasonably best efforts to prevent disclosure . . . to third parties" is stated over and beyond a promise by Cyanamid to itself keep the know-how "strictly confidential" (6a). (2) The contract further generally requires Cyanamid to "preserve and safeguard the secrecy" thereof, which would be destroyed by public disclosure from any source. (3) The agreement expressly allows Cyanamid to disclose the know-how to the contractor who was to build its plant, to subcontractors and vendors of equipment therefor, but "for use only in the construction or operation of the Plant" (6a), thus plainly indicating that Cyanamid's obligation to use "reasonably best efforts to prevent disclosure" was intended to embrace disclosure by such third parties. (4) The agreement expressly relieves Cyanamid of the obligation "to the extent that such Know-How . . . is available to the public at the time of its disclosure" (6a). Thus, if the obligation to use "reasonably best efforts to prevent disclosure" did not require Cyanamid to take appropriate efforts within its power to take to prevent public disclosure, it could, by letting such disclosure occur, relieve itself of its secrecy obligations. Plainly, in this context, the obligation was intended to require Cyanamid to take "reasonably best efforts to prevent disclosure to the public" from any source. (5) The entire intent of Article III of the agreement was plainly to preserve the secrecy of the Stamicarbon know-how.

Here, the risk of disclosure to the public comes from a situation which Cyanamid is easily able to remedy by giving its consent that evidence at the trial which discloses Stamicarbon's trade secrets be presented *in camera*, so that

they are not disclosed thereby to the public. Its ability to do so comes from the fact that the Government has consented that such evidence be received *in camera* (4a). It is these facts which are the basis of Stamicarbon's claim that Cyanamid's refusal to do so is a breach of the contract. The opposing briefs do not dispute Stamicarbon's contention that injunctive relief to require performance of that obligation is appropriate relief. The District Court expressly found that Stamicarbon would be irreparably injured by disclosure of its trade secrets at the criminal trial (43a).

B: Constitutionally-Based Arguments

The Government's brief does not dispute Stamicarbon's showing that the trade secret know-how which would be elicited at the trial is that which Cyanamid has contractually undertaken to use its reasonably best efforts to prevent disclosure of to the public. It nonetheless argues that the obligation to use "reasonably best efforts" should not be construed as requiring Cyanamid to consent to *in camera* receipt of such trade secret information at the criminal trial. It bases this argument upon a contention that New Jersey law governs interpretation of the contract and that New Jersey courts would not interpret that obligation as requiring it to so consent because of that State's strong public policy favoring public criminal trials (Government's brief pp. 9-11).

The Government's assertion that New Jersey law governs interpretation of the contract is based upon Article XII thereof, which says so, quoted in its brief (fn. 7 at p. 9). The Government's reliance upon that Article of the Stamicarbon-Cyanamid license agreement is improper because it is not in the record.

Moreover, the argument is unsound. The Government admits there is no New Jersey case law so ruling (its brief,

p. 10). Its public policy is clearly expressed by its trade secret privilege rule of evidence, 32 N.J.S.A. 2A: 84A-26, which applies to both criminal and civil cases, and provides that a person has a privilege to prevent disclosure at trials in the courts of that State of trade secrets owned by him except where the court finds that doing so would "work injustice." In addition, New Jersey law makes theft of trade secrets a serious crime, New Jersey Statutes, 2A: 119-5.3 *et seq.* This statute includes a statement that its legislative purpose was to recognize trade secrets as property. Thus, New Jersey adopts the "property" concept of trade secrets, and destruction of trade secrets by forcing public disclosure thereof at criminal trials would constitute a taking of private property for public use without just compensation, in violation of the 5th and 14th Amendments to the Constitution of the United States.

Clearly, contrary to the Government's contention, no State which has a strong rule protecting trade secrets from any disclosure at criminal trials and which regards them as property would likely regard a reasonable restriction upon an accused's constitutional right to public trial, which would exclude the public from a minor part of such a trial at which trade secrets were disclosed, in order to preserve them, as violating the right to "public trial."

Further, with due respect to the Government's views, the public policy involved with respect to the contract here is federal public policy. The question is whether protection of trade secrets from public disclosure at federal criminal trials would violate the 6th Amendment of the Constitution of the United States. New Jersey cannot properly have any independent or different State public policy upon such a subject.

Both Cyanamid and the Government further argue that Cyanamid's contractual obligations cannot be deemed a waiver by it of its assumed constitutional right to public trial of evidence of Stamicarbon's trade secrets because the contract was made *before* Cyanamid was accused of criminal contempt and thereby became entitled to such a right in the criminal proceeding, since waivers of constitutional rights must be voluntarily, intentional relinquishments of present rights (Cyanamid's brief, p. 11, Government's brief, pp. 11, 18-19). All of the cases in each brief cited in support of this contention relate to an individual accused's assent made without consideration to forego constitutional rights in criminal trials.

But these arguments miss the thrust of Cyanamid's argument. Stamicarbon's claim based upon Cyanamid's contractual obligations is not founded upon a view that Cyanamid has waived, and it is not to be tested by the strict rules by which claims of one-sided waivers of rights, constitutional or otherwise, are to be judged. Stamicarbon's contention is based upon a contract between two sophisticated corporations, in which Stamicarbon gave valuable consideration to Cyanamid in exchange from its contractual undertakings made therein. It is to be interpreted in accordance with the normal rules of contract that is according to its plain meaning, and with the intent parties and purposes of the agreement as reflected therein.

So considered, it is clear that (a) the purpose and intent of Article III of the license agreement was to preserve and protect the secrecy of the licensed know-how, and (b) the plain meaning of Cyanamid's obligation to use "reasonably best efforts to prevent the disclosure" thereof "to third parties" requires it to make a minimal effort of giving an asset to exclusion of the public from being present in a proceeding where such trade secrets are discussed.

Unlike the law of waiver,⁷ no principle of contract law dictates that a contracting party can avoid a contractual obligation because of inattention, ignorance or failure to foresee that what might be involved in performance of the obligation at a future time might conflict with its then desires or interests. Moreover, the possibility that Cyanamid might be a party to a litigation, civil or criminal in nature,⁸ at which the Stamicarbon trade secrets would be inquired about was clearly foreseeable. Assuming Cyanamid had wished to bargain for an exception to its obligation to use "reasonably best" efforts to "prevent disclosure" of Stamicarbon's trade secrets in such litigation, it should have sought such an exception in the contract.

Thus, the issue involved is not whether Cyanamid has "waived" a right to have the public present at portions of the criminal contempt trial at which Stamicarbon's trade secrets are disclosed. The issue is whether Cyanamid's contractual undertakings require it to forego the here-assumed right.

Plainly, constitutional rights are subject to reasonable restriction with respect to their exercise by contract. A contract to arbitrate future disputes arising therefrom is invariably enforced by the courts against the wishes of a

7. An entire section of Williston is devoted to the illustrative and confusing meaning of the term "waiver," 5 Williston, *On Contracts* (3rd ed.), Sec. 679, pp. 245-258.

8. For example, the so-ordered stipulation of May 27, 1969 construing the antitrust decree permitted Cyanamid to construct a melamine plant having a production capacity of 70 million pounds (14s). Its contract with Stamicarbon was made July 18, 1969 (4a) and the plant was constructed to use the Stamicarbon know-how (Cyanamid's brief, pp. 4-5). Cyanamid plainly could have anticipated that if the Government believed that the plant had a capacity of more than 70 million pounds, it might prosecute Cyanamid for criminal contempt, and that evidence of the nature and operation of the plant involving Stamicarbon trade secrets would be central thereto.

party to the dispute, who would scarcely be heard to claim that he had not agreed not to exercise his 7th Amendment right to have the dispute tried by jury when he made the agreement. In *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), cert. den. 409 U.S. 1063 (1972), the secrecy agreement contracted for by the Government as employer was enforced by enjoining Marchetti from publishing the official secrets he had learned in its employ even though his 1st Amendment right of free speech with respect to such secrets could scarcely be characterized as having existed, since he did not then know the Government's secrets, when he made the contract. Plea-bargaining may involve the contractual surrender of all 6th Amendment rights with respect to crimes as to which no indictment or information has as yet been filed, so that such rights can scarcely have existed as to the uncharged crimes at the time of the bargain.

In sum, Stamicarbon's contention is, assuming Cyanamid does have a right under the 6th Amendment to require a public trial of that part of the criminal trial as involves disclosure of its trade secrets, not that Cyanamid has waived it, but that Cyanamid has undertaken a contractual obligation which precludes it from exercising that right to that limited extent, for which it has received substantial value; and that it should be compelled to perform its agreement.

P O I N T I V

The Cyanamid-Government arguments that Cyanamid had not waived any right to require public trial of evidence of Stamicarbon's trade secrets by its consent to the May 8, 1974 order in 60 Civ. 3857 are fallacious. The fact that the order to which Cyanamid consented required use of Stamicarbon trade secret information only in a manner that would maintain its confidentiality "subject to further order of the Court" does not prevent it from having been such a waiver. The District Court's decision denying Stamicarbon's motion was not such a "further order."

The briefs of Cyanamid and the Government make only inadequate responses to Stamicarbon's contention that *even if* the Court has no inherent power to grant the *in camera* protection sought and the license agreement is construed as not obligating Cyanamid to consent to such protection, nevertheless Cyanamid, by consenting (31s) to the District Court's order of May 8, 1974 (32-33s), had waived its right to object to such *in camera* protection (Stamicarbon's brief, Point IV, pp. 34-36).⁹

Neither brief denies Stamicarbon's contention that the "sensitive commercial or proprietary information" re-

9. As the Government's brief indicates (p. 8), this argument was not made by Stamicarbon in the District Court. No mention of the stipulation of May 7, 1974 and order of May 8, 1974 was made at the hearing on Stamicarbon's motion (13-46a), and Stamicarbon's counsel did not become aware of the existence of such stipulation and order until after this appeal was taken (Appellant's brief, p. 13). Nevertheless, Judge Bricant had modified the proposed order to show cause bringing on Stamicarbon's motion before issuing it so as to make the motion considerable upon "all papers and proceedings in 60 Civ. 3857" (1s), and this Court, by order of August 21, 1974, by Judge Mansfield, as Acting Chief Judge, has ordered that the Supplement to the Joint Appendix, which contains such papers from 60 Civ. 3857, be filed upon this appeal. This Court, especially in these circumstances, has power to take judicial notice of such papers in 60 Civ. 3857 for the purpose of affirming or reversing the District Court's decision, *American Legion Post No. 90 v. First National Bank & Trust Co.*, 113 F.2d 868 (2nd Cir.).

ferred to in the May 8, 1974 order includes Stamicarbon's trade secret information and that such order provides that:

"If said . . . information . . . are used in conjunction with the trial of this case, they shall be utilized in a manner which will maintain the confidentiality of the sensitive commercial or proprietary information contained therein, subject to further order by the Court" (32-33s),

and that Cyanamid consented to such order (31s). Nor does Cyanamid or the Government dispute that Stamicarbon's trade secret information was furnished to the Government's expert, Mr. Reed, by other Stamicarbon licensees under a pledge of confidentiality (33a, 42a), and that the May 8, 1974 order refers to such information.

But both briefs argue that it is significant that this protection is stated to be "subject to further order by the Court." (Cyanamid's brief, pp. 11-12; Government's brief, fn. 15, p. 20). This argument is specious. The fact that the order might be modified by further order of the District Court does not change it from being a waiver by Cyanamid of any right it might have had to deny *in camera* protection of the sensitive information if the Court saw fit to do so. Cyanamid's consent to such an order empowered the District Court to give the very protection now sought. It is no answer that the Court might not exercise the power or might take different action. The simple fact is that Cyanamid, by consenting to the order, granted the power which the District Court, in its decision, erroneously believed it did not have (44a).

Virtually so recognizing the Government's brief (fn. 15, p. 20) further argues:

"The Court's order and opinion of July 15, 1974, in which the Court found that Cyanamid declined to waive

its right to a public trial, would appear to be just such a 'further order'."

This argument is incredible on its face. The District Court's order and opinion of July 15, 1974, on which this appeal is based, is clearly founded on the District Court's belief that Cyanamid's consent was necessary to empower it to grant *in camera* protection and that its belief that it did not have that consent and, hence, was powerless. There is not the slightest indication that it was intentionally modifying the May 8, 1974 order to strip itself of the power it clearly regretted that it lacked. The simple fact is that the broad scope of Cyanamid's waiver of a right to object to the *in camera* protection was overlooked by the Court and was unknown to Stamicarbon's counsel and was unmentioned at the hearing by counsel for Cyanamid or the Government.

It is submitted that Cyanamid's consent to such order constitutes the consent that the District Court believed it needed.

The final point made by Cyanamid is the claim that the May 8, 1974 order "certainly does not require *in camera* treatment of any evidence." (Cyanamid's brief p. 12). But Cyanamid makes no response to Stamicarbon's statement (Appellant's brief p. 11) that there is no other way that the District Court could implement the requirement of the order that, if such information was used in conjunction with the trial of the case, it "shall be used in a manner which will maintain the confidentiality of the sensitive commercial or proprietary information contained therein" (33s).

Conclusion

The District Court's denial of Stamicarbon's motion was predicated upon a view that (a) Cyanamid had a constitutional right under the 6th Amendment to require that any

evidence of Stamicarbon's trade secrets which would be disclosed at that trial be disclosed in public, even though this would irreparably injure Stamicarbon (43-44a), and (b) that the Court had no power, unless Cyanamid waived that constitutional right, to protect Stamicarbon's trade secrets from such irreparable injury. The District Court was in error. Cyanamid's constitutional right to public trial under the 6th Amendment does not here extend to a right to insist that Stamicarbon trade secret information be presented in public. Even assuming that such a right had once existed, Cyanamid's consent to the entry of the May 8, 1974 order in 60 Civ. 3857 was a waiver of that right. Even assuming that such right existed and had not been waived by that consent, Cyanamid had a contractual obligation to Stamicarbon which was enforceable which required it to forego that right. The District Court's order should be reversed.

Dated: New York, N. Y.
September 9, 1974.

Respectfully submitted,

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Attorneys for Plaintiff-Appellant

JOHN E. HAIGNEY
RONALD M. GLICK
Of Counsel



Affidavit of Service by Mail

In re:

Stamicarbon, N.V., v. American Cyanamid CompanyState of New York
County of New York, ss.:Harry Minott

being duly sworn, deposes and says, that he is over 18 years of age.
That on September 9, 1974, he served 3 copies of the
within Reply Brief in the above named matter
on the following counsel by enclosing said three copies in a securely
sealed postpaid wrapper addressed as follows:

Donovan, Leisure, Newton & Irvine, Esqs.
30 Rockefeller Plaza
New York, N.Y.

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 9th
day of Sept 1974

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1975